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AUTHOR Greenberg, Jack
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ABSTRACT

This paper briefly summarizes issues in affirmative action covered by the conference papers preceding it in the same volume. First, the definition of affirmative action adopted by the United Nations at an international convention in 1969 is reviewed. Based on this definition, the countries covered in the conference papers are classified as follows: (1) those that have affirmative action complying with the definition (Malaysia, India, Israel, and the United States); (2) countries with arrangements that do not exactly comply with the definition, but that are similar in purpose (Nigeria and Peru); (3) Yugoslavia, which as a federation of nations and nationalities has had affirmative action within a regional minority area; and (4) countries that have nothing which may be described as affirmative action (Sudan and West Germany). Groups targeted by the affirmative action policies in individual countries are then mentioned. Following this, areas in which the policies are applied (e.g., employment, education) are reviewed. Finally, the paper considers both justification for and objections to affirmation action and concludes that although the phenomenon often is necessary, it must be used carefully, and it does not reform an economically stratified society. (GC)

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AFFIRMATIVE ACTION IN OTHER LANDS:

A SUMMARY

by

Jack Greenberg

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INTERNATIONAL PERSPECTIVES ON AFFIRMATIVE ACTION

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AFFIRMATIVE ACTION IN OTHER LANDS: A SUMMARY

Jack Greenberg

The countries that have been studied for this volume are Malaysia, India, Nigeria, Israel, Sudan, Germany, Yugoslavia, Peru, and the United States.

The participant scholars examined each in an effort to identify whether it employed affirmative action, with regard to which areas of human activity, which techniques it has used, how it has functioned, where it has succeeded or failed, on which grounds it has been justified and criticized.

We have dealt with affirmative action based on race, color, religion, language, and gender, although the latter received only passing, inadequate treatment and deserves a separate, fuller study. Various definitions of affirmative action were used by the participants, but while there were differences, there were no sharp disagreements and there appeared to be no quarrel with employing the definition of the International Convention on the Elimination of All Forms of Racial Discrimination, which was adopted by the United Nations in 1969.

Article I, §4 provides:

> Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.

The studied countries may be divided into four categories:

1. Countries that have affirmative action in the sense described by the Convention: Malaysia, India, Israel, and the United States. Malaysia may be included in this group, but the favored group, the Bumiputras, are numerically and politically stronger and are committed to

maintaining affirmative programs indefinitely. Consequently, Malaysia is a variant of this category.

2. Countries with what we may call hybrid arrangements, i.e., Nigeria, which has adopted policies of redistribution targeted at particular ethnic or geographical groups, and Peru, which has adopted general political, economic, and social measures designed to aid the vast majority of the population who are Indians. While such policies are not affirmative action in the sense of the Convention, they are similar in purpose. In Nigeria, the policies are combined with some ethnic and regional proportional representation in governmental positions and regional quotas in education.

3. Yugoslavia, which is a federation of nations and nationalities, has had affirmative action within a regional minority area, i.e., Kosovo, where Albanians outnumer Serbians, unlike the rest of the country, where Serbians usually are the largest group. The Kosovo arrangement, however, now has been transformed into discrimination by Albanians against the Serbian minority within that region.

4. Countries that have nothing which might be described as affirmative action, Sudan and Germany.* In these countries, certain disadvantaged groups that are victims of severe discrimination, southern non-Islamic Sudanese, Turkish guest workers in Germany, would seem to be natural subjects for affirmative action, but are not.

Our survey covered a variety of governmental and legal structures pursuant to which affirmative action is effected. An effort to find correspondences between type of political and legal structure, the proportion or characteristics of the population that is subject to affirmative action, the type of affirmative action and how it functions, yielded little. We may conclude, however, that affirmative action policies broadly defined exist in many parts of the world, including nations not

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* Discussion developed that the Federal Constitutional Court has decided that access to higher education may not be denied to any qualified person, although it may be delayed, and that certain small quotas should be established for foreign students.

included in this study, different kinds of political systems, and with regard to different types and sizes of disadvantaged, or once disadvantaged, groups. In the course of discussion, China and Canada were mentioned as such countries.

In the United States, affirmative action (except for women) is directed at approximately 15 percent of the population (chiefly blacks and Hispanics) and derives from statutes, judicial decisions, administrative regulations, and private decision-making. There was no discussion describing the United States political system, as it was assumed that the participants were familiar with it.

In Israel, affirmative action is targeted at the Asian/African Jewish population, which has grown to be perhaps more than 50 percent of the total Jewish population. There is also a preference favoring Jews over others in immigrating into the country. There is no affirmative action for the Israel-Arab population as such, although but for ethnicity it qualifies for such policies. The Israeli policies (other than in immigration) derive mainly from nonstatutory, nonjudicially declared official exhortation.

In India, a parliamentary democracy, the policies are constitutional and implemented by regulations. They are targeted at approximately 22 percent of the population consisting of the scheduled castes and tribes, the best known of which are the untouchables. In addition, some states in India have affirmative action programs with respect to education and government employment in favor of groups designated Other Backward Classes.

Malaysia, which has what might be called an authoritarian parliamentary system, requires affirmative action for Malays by its Constitution and throughout its legal system. Malays are 45 percent of the population and other natives are 10 percent; collectively they form 55 percent of the population and are known as the Bumiputras, who are entitled to affirmative action. The remainder is principally Chinese, but includes also Indians and Europeans. The policies are fundamental to the structure of the country and, indeed, to challenge them is a crime.

In Yugoslavia, the one example of affirmative action that we considered was that favoring Albanians in Kosovo province, where they are 70 percent of the population. So far as available materials indicate, the policies have been implemented in a nonformal manner. Yugoslavia is, of course, a socialist, one-party state.

Nigeria is a consociational parliamentary state in which regions and tribes have entered into a constitutional compact assuring a certain degree of autonomy, mutual veto, and proportional representation. Three principal tribes constitute about 50 percent of the population; there are many others.

Peru has a military government. Its policies relevant to this study are directed at enhancing the economic and educational status of Indians, who constitute the vast majority of the population.

Finally, Sudan and Germany, neither of which have affirmative action, are nations in which there are substantial ethnic groups (in Germany, e.g., Turks; in the Sudan, southern non-Islamic Sudanese) who are victims of discrimination and extremely deprived in socioeconomic status.

Notwithstanding the affirmative action provisions of the International Convention quoted above, none of the countries under discussion relies upon the Convention to justify affirmative action policies.

Affirmative action is employed across a broad range of activities but not all countries treat all areas to the same extent. By far the most widespread use of affirmative action appears in Malaysia, where it is applicable to government positions, private employment, business ownership, credit and land ownership. In Kosovo, it appears to be pervasive as well. In India, the policies focus on educational and government employment, in Israel on education. In higher education, it takes the form of special preparatory courses, enrollment in which disproportionately helps Asian-African Jews, but others as well. In the United States, education, governmental and private employment, and the electoral process are subjects of affirmative action. There is also some private effort affirmatively to integrate minorities on corporate boards of directors and to encourage minority small business ownership.

In Nigeria, there are regional quotas for enrollment in higher education that may be translated into ethnic terms. There is also regional and, therefore, tribal proportional representation in governmental positions.

We find no mention of private employment in connection with affirmative action in India, Israel, Nigeria, or Peru.

The results of affirmative action are generally that where it has been employed, it has increased minority participation. In Malaysia, the Malay population has made rapid advances in participation in virtually all sectors except that of business ownership and senior management positions in private industry. In the United Staes, to the extent that scholars have been able to measure, affirmative action has been found to be responsible for marked increases in minority participation in managerial positions and the professions and for moderate gains in higher education. In India, scheduled castes and tribes have substantially increased their presence in government positions, and there has been a substantial increase in literacy as well as participation in higher education. In Israel, affirmative action is focused on education and particularly on special tutorial programs preparatory to university admission where it has been successful in affording access to Asian-African Jews, who are economically deprived.

In Yugoslavia, the Albanians in Kosovo, who are a majority of the population of that province, although a small minority of the entire country, and who once were severely disadvantaged, now occupy positions throughout the province to an extent that discriminates against the nationaly numerically dominant Serbians, who are a minority in Kosovo.

Each of the countries that have affirmative action policies, except Malaysia, also embraces legal doctrines and social values from which, at the same time, the legal and moral validity of affirmative action has been opposed. In the United States, affirmative action has been advocated and opposed on the basis of the Equal Protection Clause and Title VI of the Civil Rights Act of 1964. In Israel, although affirmative action does not derive from positive legal sources, it has been promoted on the basis of

general egalitarian principles, which also have been marshaled to oppose it. In India, the affirmative action provisions of the Constitution are exceptions to the provisions that secure equality. In Yugoslavia, affirmative action has been advocated to promote oquality, but it has been argued that it contradicts express provisions that secure equality. Only in Malaysia, as noted above, is it enshrined in the Constitution and placed beyond the possibility of contradiction.

The justifications for affirmative action in each of the countries that employ it ordinarily are not articulated in a definitive way. They usually appear in the course of describing or upholding policies, sometimes judicial decisions, in scholarly commentaries, or political discussion.

1. The justification offered perhaps most frequently is the need to improve the lot of deprived groups in society by redistribution of wealth, income, power, and prestige. This appears in India, Nigeria, Israel, Malaysia, and the United States.

2. Sometimes affirmative action has been justified as a means of righting past wrongs. We find this justification in India, the United States, Yugoslavia, and Israel.

3. Affirmative action has been supported as a method of promoting social harmony by reducing differences among groups. This reason has been offered in Israel, Malaysia, and the United States.

4. Affirmative action also has been propounded on the ground that traditional measuring devices unfairly discriminate among groups. This reason has been used in Nigeria and the United States.

5. Affirmative action has been instituted to promote contact among members of different groups, out of which learning and understanding derive from one another, a rationale employed in the United States with regard to higher education.

6. In one country, Nigeria, affirmative action has been asserted as an expression of community as opposed to individual rights.

7. In Israel, it has been justified as a means of building self-respect of groups who are held in low esteem.

8. In Israel, too, the special affirmative action that facilitates Jewish immigration is justified as a means of nation-building.

Notwithstanding its justifications and frequent success in achieving its objectives, many objections, practical and principled, have been leveled against affirmative action. It is argued that:

1. It does not always reach its intended beneficiaries. In Malaysia, there are "Ali-Baba" front men who nominally control businesses because they are Malays, but in fact the real parties in interest are Chinese or Europeans. This has been seen in the United States, where nominally minority-owned businesses turn out in fact really to be white-controlled.

2. Similarly disadvantaged groups and similarly disadvantaged individuals within groups are not treated equally. For example, in India, only certain disadvantaged castes have received benefits of affirmative action. Others said to be equally disadvantaged have not. Moreover, in India and Malaysia, only certain elites within subject groups have in fact been favored, although official policies are nominally neutral among the groups enjoying such benefits.

3. A related objection is that distribution within each beneficiary group has remained as inequitable as in society as a whole. For example, in the United States, it has been asserted that wealthy black businessmen or professionals have received benefits while the minority population as a whole remains greatly deprived.

4. It is argued that affirmative action philosophically contradicts the ethos of societies like the United States and India, which favors individual over group rights.

5. In societies where affirmative action is justified as securing compensation for those who are victims of an earlier oppressive situation, it often helps those who personally were not victimized at the expense of some who were not oppressors. This has been argued in India, the United States, and Israel.

6. It has been asserted that affirmative action leads to economic or administrative inefficiency by placing unqualified persons in

positions of responsibility. This has been heard in India and the United States.

7. Where affirmative action is advocated as a temporary measure, it may tend to become permanent. In India, it has continued with respect to some Other Backward Classes which now occupy positions of power and prestige but insist upon continuation of the program. It is anticipated by some that the experience will be the same with respect to Scheduled Castes and Tribes where they achieve parity. Related to this is its use on behalf of those (or their families) who are not disadvantaged but have achieved equality with the majority group.

8. Affirmative action is said to disturb harmony and create backlash, as has appeared in the United States in the conflict between Jews, other white ethnic groups, and blacks. In Israel, there is conflict between European and Sephardic Jews; in India, between scheduled castes and others.

9. Affirmative action has been said to lead to low self-esteem of those who have been advanced pursuant to it, and

10. to lower perceived worth of the beneficiaries by others who question their ability to function in positions for which they have been selected.

Virtually all of these objections have their counterparts in the justifications described earlier.

In conclusion, we find that affirmative action is a device used in many kinds of societies, democratic, socialist, authoritarian, consociational, and postcolonial in order to help minorities (or in Malaysia a majority) previously discriminated against to overcome disadvantage in many areas of economic, social, and political life. It has effected some change for some people, often many, as we find in Malaysia, Kosovo, the United States, Israel, and India. It has made a positive difference where other measures have failed. It does not, however, address the basic structure of the economy. That is, an economically stratified economy stays that way, although some members of racial or ethnic groups who had been confined to lower levels may obtain access to upper levels. Other

economic and class injustices are not affected, at least directly. Affirmative action is generally associated with opposition to racial discrimination, although it can become discriminatory itself. While it is often the only remedy, it is sometimes susceptible to distortion and abuse.

Affirmative action may be likened to a powerful drug that must be used for a serious illness but should be employed carefully to minimize objections and facilitate the goals it seeks to advance. The paper on the United States indicates that in this country, of which this writer can speak with some familiarity, it has been used appropriately and successfully. Where it has been the subject of litigation before the Supreme Court of the United States, that Court uniformly and sensitively approved affirmative policies. The cases include Bakke, Weber, Fullilove (with regard to employment), United Jewish Organizations (with regard to voting), Swann (with regard to schools). The Court has demonstrated awareness of the needs for and strengths of the policies, as well as their negative potential, and has generally arrived at a constructive balancing of conflicting considerations.